Office-Supreme Court, U.S.
FILED
MAY 29 1981
ALEXANDER STEVAS,
CLERK

80-2015

No. 80-_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ASARCO INCORPORATED (formerly The American Smelting and Refining Company), *Appellant,*

v.

IDAHO STATE TAX COMMISSION, *Appellee.*

On Appeal from the Supreme Court of Idaho

JURISDICTIONAL STATEMENT

GEORGE W. BEATTY
(Counsel of Record)

WILLIAM L. GOLDMAN
1200 18th Street, N.W.
Washington, D.C. 20036
(202) 457-8528

PHILIP E. PETERSON
318 5th Street
Lewiston, Idaho 83501

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTIONS PRESENTED

1. Whether, under the "unitary business" test laid down by this Court in *Mobil Oil Corp.* v. *Commissioner of Taxes of Vermont,* 445 U.S. 425, 100 S.Ct. 1223 (1980), Idaho's inclusion in Appellant's apportionable business income of dividends paid to Appellant by functionally independent subsidiaries contravenes the Due Process Clause of the Fourteenth Admendment to the Constitution of the United States.

2. Whether Idaho's inclusion of interest and capital gains attributable to Appellant's investment in such subsidiaries contravenes the Due Process Clause.

3. Whether Idaho's inclusion of foreign source dividends and interest in apportionable business income contravenes the Commerce Clause of Article I, Section 8 of the Constitution.

4. Whether, if some portion of the dividends, interest or capital gains in issue may constitutionally be included in Appellant's apportionable business income, the Due Process Clause will still be violated unless a correlative adjustment is made to Idaho's apportionment factor.

INDEX

	PAGE
QUESTIONS PRESENTED	i
OPINIONS BELOW	1
JURISDICTION	2
STATUE INVOLVED	4
STATEMENT OF THE CASE	4
REASONS FOR NOTING JURISDICTION	8
(1) Under the "Unitary Business" Test Laid Down by this Court in *Mobil*, Idaho's Inclusion of the Dividends in Issue in Appellant's Apportionable Business Income Contravenes the Due Process Clause	10
(2) Idaho's Inclusion of the Interest and Capital Gains in Issue in Appellant's Apportionable Business Income Contravenes the Due Process Clause	14
(3) Apportionment of Appellant's Foreign Source Dividend and Interest Income Also Contravenes the Commerce Clause	15
(4) If Some Portion of the Dividends, Interest and Capital Gains in Issue May Constitutionally Be Included in Appellant's Apportionable Business Income, the Due Process Clause Will Still Be Violated Unless a Correlative Adjustment Is Made to Idaho's Apportionment Factor	16
CONCLUSION	20

TABLE OF AUTHORITIES

CASES: PAGE

American Bakeries Co. v. *Johnson*, 259 N.C. 419, 131 S.E.2d 1 (1963) 12

Am. Smelting & Refining Co. v. *Idaho St. Tax Com'n*, 99 Idaho 924, 592 P.2d 39 (1979) 1

ASARCO Inc. v. *Idaho State Tax Comm'n*, 445 U.S. 939, 100 S.Ct. 1333 (1980) 2

Atlantic Richfield Co. v. *State*, 601 P.2d 628 (Colo. 1979) 14

Bass, Ratcliff & Gretton v. *State Tax Commission*, 266 U.S. 271 (1924) 11

Butler Bros. v. *McColgan*, 315 U.S. 501 (1942) 18, 19

Champion International Corp. v. *Bureau of Revenue*, 88 N.M. 411, 540 P.2d 1300 (1975) 14

Commonwealth v. *ACF Industries, Inc.*, 441 Pa. 129, 271 A.2d 273 (1970) 14

Commonwealth v. *Advance-Wilson Industries, Inc.*, 317 A.2d 642 (Pa. 1974) 12

Exxon Corp. v. *Wisconsin Dept. of Revenue*, 447 U.S. 207, 100 S.Ct. 2109 (1980) 9, 12

F.W. Woolworth Co. v. *Taxation and Revenue Department of the State of New Mexico*, (Sup. Ct. Docket No. 80-1745) 9, 14

F. W. Woolworth Co. v. *Taxation and Revenue Department of the State of New Mexico*, 624 P.2d 28 (N.M. 1981) 9

General Motors Corp. v. *Washington*, 377 U.S. 436, 84 S.Ct. 1564, 12 L.Ed.2d 430 (1964) 17

Gulf Oil Corp. v. *Clayton*, 267 N.C. 15, 147 S.E.2d 522 (1966) 12

Hans Rees' Sons, Inc. v. *North Carolina ex rel. Maxwell*, 283 U.S. 123 (1931) 19

Japan Line Ltd. v. *County of Los Angeles*, 441 U.S. 434, 99 S.Ct. 1813 (1979) 16

Table of Authorities Continued

CASES: PAGE

Mobil Oil Corp. v. *Commissioner of Taxes of Vermont*, 445 U.S. 425, 100 S.Ct. 1223 (1980) ..... *passim*, 3

Moorman Mfg. Co. v. *Bair*, 437 U.S. 267 (1978) 3

Norfolk & Western Ry. Co. v. *Missouri State Tax Commission*, 390 U.S. 317 (1968) 19

People ex rel. Alpha Portland Cement Co. v. *Knapp*, 230 N.Y. 48, 129 N.E. 202 (1920) 15, 19

Qualls v. *Montgomery Ward & Co., Inc.*, 266 Ark. 207, 585 S.W. 2d 18 (1979) 14

Sperry and Hutchinson Co. v. *Department of Revenue*, 270 Ore. 329, 527 P.2d 729 (1974) 14

Square D Co. v. *Kentucky Board of Tax Appeals*, 415 S.W.2d 594 (Ky. 1967) 12

CONSTITUTION OF THE UNITED STATES:

Commerce Clause, Art. I, §8 15

Due Process Clause, Fourteenth Amendment ... 9, 10, 15, 19

STATUTES AND REGULATIONS:

28 U.S.C. §1257(2) 3

Idaho Code §63-3027 ..... 4, 7

Income Tax Assessment Act, 1936-1973 (Australia)

section 128A 16

section 128B 16

section 221, YL 16

Income Tax Law (Mexico)

Article 60, V 16

Article 61 16

Article 65 16

Article 73, I 16

Article 74 16

No. 80-_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ASARCO INCORPORATED (formerly The American Smelting and Refining Company), *Appellant,*

v.

IDAHO STATE TAX COMMISSION, *Appellee.*

On Appeal from the Supreme Court of Idaho

JURISDICTIONAL STATEMENT

OPINIONS BELOW

This case is now before this Court for the second time. The second opinion of the Supreme Court of the State of Idaho, from which this appeal is now taken, is unreported. That opinion simply reinstated the initial opinion of the Idaho Supreme Court following a remand from this Court. The initial opinion of the Idaho Supreme Court is reported as *Am. Smelting & Refining* v. *Idaho St. Tax Com'n*, 99 Idaho 924, 592 P.2d 39

(1979). Included as Appendix A, *infra,* are copies of: the second opinion of the Idaho Supreme Court on remand from this Court (App. A, *infra,* pp. 1a-2a); the order of this Court[1] vacating the first judgment of the Idaho Supreme Court and remanding the case for further consideration (App. A, *infra,* p. 3a); the first opinion of the Idaho Supreme Court (App. A, *infra,* pp. 4a-35a); the unreported Memorandum of the District Court of the Fourth Judicial District of the State of Idaho, Ada County (the "State District Court") (App. A, *infra,* pp. 36a-37a); the unreported Findings and Conclusions of the State District Court (App. A, *infra,* pp. 38a-45a); and the unreported Decision of the Idaho State Tax Commission (App. A, *infra,* pp. 46a-62a).

JURISDICTION

This proceeding involves the application of Idaho's corporate income tax statute. Appellant challenged the deficiencies asserted by the Idaho State Tax Commission on both statutory and constitutional grounds.[2]

Appellant's statutory arguments were upheld by the State District Court (App. A, *infra,* pp. 36a-37a, 44a-45a) and, accordingly, that court did not reach the constitutional issues. In its first opinion on March 12, 1979, the Idaho Supreme Court reversed and held that certain dividends and other income from intangibles were includable in Appellant's apportionable "business income" and, therefore, subject to tax in Idaho. (App. A, *infra,* pp. 19a-26a) In reversing the lower court with respect to the business income issue, the Idaho Supreme Court first rejected Appellant's statutory interpretation

[1] This Court's order is reported as *ASARCO Inc.* v. *Idaho State Tax Comm'n,* 445 U.S. 939, 100 S.Ct. 1333 (1980).

[2] Appellant raised the Federal constitutional issues on page 4 of its protest filed with the Idaho State Tax Commission, in paragraphs 3 and 4 of its Complaint filed in the State District Court and on pages 18-24 of the initial brief which it filed as Appellee in the Idaho Supreme Court.

and then upheld the statute against Appellant's constitutional challenge. (App. A, *infra,* pp. 26a-33a) The Idaho Supreme Court then remanded the case to the Idaho State District Court for further proceedings and computations unrelated to the constitutional issues presented here. Included in Appendix B, *infra,* is a copy of the Remittitur, dated April 3, 1979. (App. B, *infra,* p. 63a)

On June 8, 1979, Appellant appealed to this Court from the Idaho Supreme Court by filing its Jurisdictional Statement (Sup. Ct. Docket No. 78-1839). On March 24, 1980, this Court entered its order vacating the judgment of the Idaho Supreme Court and remanding the case "for further consideration in light of *Mobil Oil Corp.* v. *Commissioner of Taxes of Vermont, ante,* p. 425." (App. A, *infra,* p. 3a) On March 4, 1981, however, the Idaho Supreme Court responded by simply filing a single paragraph, *per curiam* opinion reinstating its initial opinion of March 12, 1979. (App. A, *infra,* pp. 1a-2a) Accordingly, the Idaho Supreme Court then entered its second Remittitur, dated March 26, 1981, remanding the case to the State District Court for further proceedings. (App. B, *infra,* p. 64a)

Included in Appendix C, *infra,* is a copy of the Notice of Appeal which Appellant filed in the Idaho Supreme Court on May 18, 1981.[3] (App. C, *infra,* p. 65a) This Jurisdictional Statement is being filed within 90 days of March 4, 1981, the date on which the Idaho Supreme Court rendered its second decision upholding the constitutionality of the Idaho taxing statute as applied to Appellant. Accordingly, this Court has jurisdiction under 28 U.S.C. §1257(2). *Mobil Oil Corp.* v. *Commissioner of Taxes of Vermont,* 445 U.S. 425, 100 S.Ct. 1223 (1980); *Moorman Mfg. Co.* v. *Bair,* 437 U.S. 267 (1978).

---

[3] Appellant also filed a copy of the Notice of Appeal in the State District Court on May 18, 1981. (App. C, *infra,* p. 66a)

STATUTE INVOLVED

Section 63-3027 of the Idaho Code is set forth in Appendix D, *infra.*

STATEMENT OF THE CASE

ASARCO Incorporated, the Appellant, is engaged in the business of mining, smelting, refining and selling non-ferrous metals. Appellant is incorporated in New Jersey, maintains its headquarters or "commercial domicile" in New York, and conducts business in a number of other states, including Idaho. Appellant's principal business in Idaho is mining silver. In addition, Appellant mines lead and zinc, operates the administrative office for its northwest mining division, and sells small amounts of secondary metals in Idaho. Appellant's smelting, refining and other activities are conducted elsewhere. (App. A, *infra,* pp. 39a-41a; Stip. ¶ ¶ 12, 14)[4]

During the years in issue, 1968 through 1970, Appellant received sizeable dividends from General Cable Corporation ("General Cable"), Revere Copper and Brass, Incorporated ("Revere"), M.I.M. Holdings, Ltd. ("M.I.M."), ASARCO Mexicana, S.A. ("Mexicana") and Southern Peru Copper Corporation ("Southern Peru"). Appellant also received interest on Revere's convertible debentures, on a note received in connection with a prior sale of Mexicana stock, and on a note received in connection with a sale of General Cable stock. In addition to the capital gain which Appellant realized on the General Cable stock sale, Appellant realized capital gains in 1968 and 1969 on the sale of a

---

[4] "Stip." references are to the Stipulation filed in the State District Court proceeding.

small part of its M.I.M. stock. Appellant also received other income from intangibles during the years in issue. However, for purposes of this appeal, Appellant is limiting its constitutional challenge to the treatment given by the Idaho State Tax Commission to the foregoing dividends, interest and capital gains.[5]

General Cable and Revere are engaged in the metal fabricating business which is a business not conducted by Appellant. During the taxable years here involved, Appellant owned approximately 35% of the stock of these corporations, but Appellant had no representatives on their Boards of Directors, no common directors, and no common officers. An antitrust decree prohibited Appellant from even voting its stock in these corporations. While both companies purchased substantial amounts of copper from Appellant, the antitrust decree expressly prohibited Appellant from selling copper to them at prices lower than those quoted to competitors. During 1970, Appellant was compelled by the antitrust decree to sell its General Cable stock. Following the stock sale, Appellant continued to sell copper to General Cable on the same basis as it did prior to the stock sale. (App. A, *infra,* pp. 8a-9a; Stip. ¶ ¶ 4-7, 10; Tr. 73-76)[6]

M.I.M. is a major corporation engaged in mining, milling, smelting and refining. It does business both in Australia and in England. During the years in issue, Appellant owned approximately 53% of M.I.M., with the balance of the stock being widely held. Appellant has no representatives on the M.I.M. Board of Directors, no

---

[5] A schedule of Appellant's dividends, interest income and capital gains during the years in issue, taken from ¶ 11 of the Stipulation, is set forth in Appendix E, *infra.*

[6] "Tr." references are to the Reporter's Transcript of the State District Court proceeding.

common directors, and no common officers. In addition, there are no significant business transactions between the two corporations. M.I.M. operates with total independence and Appellant has not participated in any of its activities. (App. A, *infra*, pp. 8a, 43a; Stip. ¶ ¶ 4-7, 10; Tr. 69-73)

During the years involved, Appellant owned 49% of the stock of Mexicana. Mexican law prohibits the ownership of any greater percentage. Appellant does not control Mexicana or dictate its policy; Mexicana acts independently of Appellant. There are no common officers of the two companies. While Mexicana is engaged in the same general line of business as Appellant, the only intercompany sales between the two corporations are occasional spot purchases of concentrates by Appellant from Mexicana. Appellant also performs some miscellaneous services for Mexicana, but Appellant is compensated for these services on an arm's length basis. (App. A, *infra*, pp. 9a-10a, 43a; Stip. ¶ ¶ 4-7, 10; Tr. 65-69)

Appellant owns 51.5% of the stock of Southern Peru, but, pursuant to the terms of an agreement with the other shareholders of Southern Peru, Appellant cannot exercise control of the corporation. Under the agreement, which is incorporated in Southern Peru's by-laws, Appellant can appoint only six of the thirteen directors. Approximately 35% of the copper produced by Southern Peru is sold to Appellant. The remaining production is sold to various buyers, 30% to buyers in Europe and the balance to the other shareholders. All of the sales are made at arm's length prices. Southern Peru has its own operating staff and Appellant receives a fee for the incidental technical services which it provides. (App. A, *infra*, pp. 7a-8a, 43a; Stip. ¶ ¶ 4-7, 10; Tr. 55-64)

In almost all instances, the parties stipulated that the corporations paying the dividends made no sales or purchases in Idaho, had no representatives or agents in Idaho, and conducted no business activity in Idaho during the years in issue. (Stip. ¶ 9(a)) In a few instances, no information was available with respect to the sales and business activities of the payor corporations in Idaho. (Stip. ¶ 9(b)) There was no evidence or assertion, however, that any of the corporations did conduct business in Idaho.

In filing its Idaho tax return for 1969 and 1970, Appellant apportioned its operating business income between sources within and without Idaho on the basis of the three-factor formula prescribed pursuant to Idaho Code §63-3027. (See App. D, *infra*, pp. 71a-73a)[7] This three-factor formula attributed to Idaho that fraction of Appellant's total "business income" which was the average of the fractions of Appellant's total tangible property, payroll, and sales attributable to Idaho. Appellant believed that all of its dividend, interest and capital gain income in issue constituted non-business income.[8] Accordingly, instead of including these amounts in its apportionable business income, Appellant allocated them to New York, its commercial domicile, pursuant to Idaho Code §63-3027(f)(3) and (g). (App. D, *infra*, pp. 69a-70a) As a result, Appellant's Idaho taxable income for 1969 and 1970 was reported as $419,876 and $127,775, respectively. (Tr. 130)

---

[7] For 1968, Appellant reported its Idaho tax using a separate accounting, rather than an apportionment, method. (Stip. ¶ 3)

[8] Appellant also treated its other income from intangibles as non-business income. This treatment was part of a compromise reached in 1970 whereby Appellant agreed to apportion its business income rather than use separate accounting. (Stip. ¶ 3) However, Appellant has not appealed with respect to these other items.

On audit, the Idaho State Tax Commission determined that all of Appellant's dividend, interest and capital gain income was includable in its apportionable business income. Because of the large amounts involved (see Appendix E, *infra*), this adjustment increased Appellant's Idaho taxable income to $2,274,750 in 1969 and $2,162,340 in 1970. (App. A, *infra*, p. 39a)

Appellant challenged the inclusion of the dividend, interest and capital gain income in its apportionable business income on both statutory and constitutional grounds. The Idaho State Tax Commission rejected both of these challenges. (App. A, *infra*, pp. 53a-61a) As indicated above, the State District Court upheld Appellant's statutory argument without reaching the constitutional issues. (App. A, *infra*, pp. 36a-37a, 44a-45a) The Idaho Supreme Court reversed, however, rejecting most of Appellant's statutory arguments (App. A, *infra*, pp. 12a-26a) and all of its constitutional arguments. (App. A, *infra*, pp. 26a-33a)[9] Appellant appealed to this Court which vacated the judgment of the Idaho Supreme Court and remanded the case "for further consideration in light of" *Mobil*. (App. A, *infra*, p. 3a) On remand, however, the Idaho Supreme Court simply reinstated its first opinion. (App. A, *infra*, pp. 1a-2a) Accordingly, Appellant appeals for the second time to this Court.

REASONS FOR NOTING JURISDICTION

This case involves substantial constitutional issues left unresolved by this Court's decisions in *Mobil Oil Corp.* v. *Commissioner of Taxes of Vermont, supra*, and

---

[9] The Idaho Supreme Court did hold that a small portion of Appellant's dividend income constituted non-business income which was not subject to apportionment under the Idaho Code. (App. A, *infra*, p. 23a)

Exxon Corp. v. *Wisconsin Dept. of Revenue*, 447 U.S. 207, 100 S.Ct. 2109 (1980). First, there is a need to resolve a conflict among the states and to clarify the constitutional limits of the "unitary business" test in *Mobil*. In addition, Appellant's alternative contention concerning the constitutional requirement for some adjustment to the apportionment factor in a case such as this was specifically identified and deliberately left unresolved by this Court in *Mobil*.

On remand, the Idaho Supreme Court simply reinstated its initial opinion in this case without any further discussion of the issues. (App. A, *infra*, pp. 1a-2a) Thus, there is a need for this Court to now do what the Idaho Supreme Court failed to do on remand — that is, to analyze and discuss the issues "in light of" *Mobil*.

The constitutional issues presented here are essentially the same as those presented in *F. W. Woolworth Co.* v. *Taxation and Revenue Department of the State of New Mexico*, 624 P.2d 28 (N.M. 1981), which was appealed to this Court on April 17, 1981 (Sup. Ct. Docket No. 80-1745).[10] It is plain that these issues are of great

---

[10] *Woolworth* presents one issue not present here — namely, the constitutionality of New Mexico's inclusion in Woolworth's apportionable business income of an amount equal to the "deemed paid" foreign tax credit allowed by the Federal Government with respect to certain dividend income. This case involves one issue not present in *Woolworth* — namely, the constitutionality of Idaho's treatment of Appellant's interest and capital gains income; only dividend income is involved in *Woolworth*. Aside from these differences, however, the other constitutional issues presented in the two cases are the same.

Two of the counsel for Appellant in this case also are counsel for F. W. Woolworth Co. in its appeal to this Court. Accordingly,

importance and arise in every state which, as a nondomiciliary state, seeks to tax a resident[11] corporation on dividends, interest and capital gains attributable to investments in functionally independent corporations operating entirely outside the taxing state.[12]

(1) Under the "Unitary Business" Test Laid Down by this Court in *Mobil*, Idaho's Inclusion of the Dividends in Issue in Appellant's Apportionable Business Income Contravenes the Due Process Clause.

In *Mobil* this Court was confronted with the question of whether, under the Due Process Clause, a nondomiciliary state (Vermont) could constitutionally tax (by inclusion in apportionable income) certain dividends received by a resident corporation (Mobil) from other nonresident corporations having no contact with the taxing state. The Court upheld the constitutionality of the Vermont tax as applied to Mobil, stating (445 U.S. at 439-440):

> "[T]he linchpin of apportionability in the field of state income taxation is the unitary business principle. In accord with this principle, what appellant

---

since the issues in the two cases are essentially the same, portions of the two Jurisdictional Statements, where appropriate, also are the same.

[11] As used hereinafter, the term "resident" corporation means a corporation which is doing business within the taxing state, but is organized under the laws of some other state and has its headquarters or commercial domicile in some other state.

[12] The states asserting jurisdiction to tax dividends, and the relevant statutory provisions, are listed in Appendix F to Mobil's Jurisdictional Statement. According to that Appendix, at least 26 states and the District of Columbia assert taxing jurisdiction in cases such as this, and the potential tax revenues are enormous. For the convenience of the Court, Appendix F to Mobil's Jurisdictional Statement is reproduced in Appendix F, *infra*.

must show, in order to establish that its dividend income is not subject to an apportioned tax in Vermont, is that the income was earned in the course of activities unrelated to the sale of petroleum products in that State. *Bass, Ratcliff & Gretton* [266 U.S. 271 (1924)] forecloses the contention that the foreign source of the dividend income alone suffices for this purpose. Moreover, *appellant has made no effort to demonstrate that the foreign operations of its subsidiaries and affiliates are distinct in any business or economic sense from its petroleum sales activities in Vermont.* Indeed, all indications in the record are to the contrary, *since it appears that these foreign activities are part of appellant's integrated petroleum enterprise* . . . Vermont was entitled to conclude that the dividend income's foreign source did not destroy the requisite nexus with instate activities."

* * *

"Nor do we find particularly persuasive Mobil's attempt to identify a separate business in its holding company function. *So long as dividends from subsidiaries and affiliates reflect profits derived from a functionally integrated enterprise, those dividends are income to the parent earned in a unitary business. One must look principally at the underlying activity, not at the form of investment, to determine the propriety of apportionability.*" [Footnotes deleted; emphasis supplied]

We think it plain that the test adopted by this Court in *Mobil* is whether the "underlying activity" — that is, the business of the dividend paying corporation — is part of a "functionally integrated enterprise" being conducted, in part, by the resident corporation in the taxing state. The issue, after all, is to determine that portion of the resident corporation's business income which is attributable to its activities in the taxing state. Unless the business of a dividend paying corporation is functionally

integrated and coordinated with the operations of the resident corporation in the taxing state, there is no reason to treat the dividends as part of the resident corporation's "unitary business" income.

Appellant's interpretation of the "unitary business" test in *Mobil* is consistent with a number of prior state court decisions. See, e.g., *Square D Co.* v. *Kentucky Board of Tax Appeals*, 415 S.W.2d 594 (Ky. 1967) and *Gulf Oil Corp.* v. *Clayton*, 267 N.C. 15, 147 S.E.2d 522 (1966). In both cases, because the business operations of a parent and subsidiary were not integrated, the businesses were not treated as parts of a "unitary" enterprise even though there was common ownership and both corporations were engaged in the same line of business. See also *American Bakeries Co.* v. *Johnson*, 259 N.C. 419, 131 S.E.2d 1 (1963).[13]

The decision below is in direct conflict with the foregoing authorities. The Idaho Supreme Court has held that dividend income received by a resident corporation from a nonresident corporation may constitutionally be taxed by a nondomiciliary state if the resident

---

[13] Similarly, where two businesses of a single corporation are not functionally integrated, the two businesses do not constitute a single unitary business. See, *e.g.*, this Court's opinion in *Exxon Corp.* v. *Wisconsin Dept. of Revenue, supra.* In that case, income derived from the sale of crude oil and gas to third parties at the wellhead was excluded from the apportionable income of Exxon's unitary petroleum business. See also *Commonwealth* v. *Advance-Wilson Industries, Inc.*, 317 A.2d 642 (Pa. 1974), where a single corporation conducted two different businesses, a ceramic tile business and an electrolyzing business, which were held to be separate businesses. It did not matter that both businesses were conducted as divisions of the same corporation so that there was common ownership and control, or that the home office performed certain administrative and other functions for both divisions.

corporation owns a "controlling" stock interest in the nonresident corporation, and both corporations are engaged in "virtually the same business". (App. A, *infra*, pp. 22a-23a) The decision below would permit such dividends to be taxed even though: (1) the recipient corporation admittedly "did not exercise its right to control" the payor corporation; (2) the payor corporation "operated independently of" the recipient corporation; and (3) the two corporations "did little if any business" with each other. (App. A, *infra*, p. 22a)

The admission by the court below that Appellant and M.I.M. "operated independently" of each other should be dispositive of the constitutional issue. The dividends Appellant received from M.I.M. are not properly taxable in Idaho because the independent operations of the two companies are the antithesis of a "unitary business", which is the "linchpin of apportionability". (445 U.S. at 439) It is equally clear that the dividends which Appellant received from the other payor corporations were not "profits derived from a functionally integrated enterprise".(445 U.S. at 440) For example, Appellant was prevented by an anti-trust decree from exercising any degree of control over General Cable and Revere or selling copper to them at prices lower than those quoted to competitors. Revere and General Cable were not even in the same line of business as Appellant; they were *fabricators* of metal products and did no mining, smelting or refining as Appellant did. (App. A, *infra*, p. 8a) With respect to the two remaining corporations, Mexicana and Southern Peru, the State District Court made uncontradicted findings of fact that Appellant did not control either of these corporations, and that both of them "operate[d] independently of" Appellant. (App. A, *infra*, p. 43a)

The Idaho Supreme Court reached the wrong result in this case because it based its constitutional decision on

the state statutory test for defining "business income" rather than the "functional integration" test prescribed by this Court in *Mobil*. (App. A, *infra*, p. 28a) Regardless of the facts which led the Idaho Supreme Court to conclude that the state statutory test was satisfied (e.g., ownership of stock or conduct of the same type of business), the evidence of record provides no basis for concluding that the separate and distinct constitutional test also was satisfied.

It is important for this Court to resolve the conflict among the states and to clarify the constitutional limits of the "unitary business" concept. Furthermore, the appeals in this case and in *Woolworth* present a variety of factual circumstances which could offer this Court an ample opportunity to fully consider and clarify the unitary business test of *Mobil*.

(2) Idaho's Inclusion of the Interest and Capital Gains in Issue in Appellant's Apportionable Business Income Contravenes the Due Process Clause.

Mobil involved only dividend income; the present case also involves interest income and capital gains attributable to Appellant's investments in the dividend paying corporations. See Appendix E, *infra*. There are many cases in which state courts have considered whether a resident corporation's interest income or capital gains from intangibles are sufficiently related to the corporation's activities within the taxing state to justify apportionment. See, e.g., *Qualls* v. *Montgomery Ward & Co., Inc.*, 266 Ark 207, 585 S.W.2d 18 (1979); *Atlantic Richfield Co.* v. *State*, 601 P.2d 628 (Colo. 1979); *Champion International Corp.* v. *Bureau of Revenue*, 88 N.M. 411, 540 P.2d 1300 (1975); *Sperry and Hutchinson Co.* v. *Department of Revenue*, 270 Ore. 329, 527 P.2d 729 (1974); *Commonwealth* v. *ACF*

Industries, Inc., 441 Pa. 129, 271 A.2d 273 (1970); and *People ex rel. Alpha Portland Cement Co.* v. *Knapp*, 230 N.Y. 48, 129 N.E. 202 (1920). By noting jurisdiction, this Court has the opportunity to consider this question and determine whether the test to be applied with respect to dividends also applies equally to interest and capital gains attributable to investments in the dividend paying corporations.

Appellant contends that the result under the Due Process Clause should be the same since, in each instance, Idaho is making the same impermissible attempt to tax "extraterritorial values." *Butler Bros.* v. *McColgan*, 315 U.S. 501, 507 (1942). Appellant's interest income and capital gains in issue were no more related to Appellant's business conducted in Idaho than were Appellant's dividend income from those same corporations.

(3) Apportionment of Appellant's Foreign Source Dividend and Interest Income Also Contravenes the Commerce Clause.

Mobil also involved the application of the Commerce Clause. Mobil argued that (445 U.S. at 442):

> ". . . Vermont's tax imposes a burden on interstate and foreign commerce by subjecting [Mobil's] dividend income to a substantial risk of multiple taxation."

Mobil premised this "multiple taxation" argument on the assumption that all of its dividend income was fully taxable in the state of commercial domicile and, therefore, any apportionment to Vermont unavoidably subjected Mobil to the risk of multiple taxation at the state level. In deciding the Commerce Clause issue against Mobil, this Court rejected the premise for Mobil's argument. That is, the Court rejected Mobil's assumption that the dividends would necessarily be subject to tax in the state of commercial domicile.

Appellant's "multiple taxation" argument goes beyond Mobil's and, therefore, was not dealt with by this Court. Mobil's argument centered on the "risk" of multiple taxation by both the state of commercial domicile and another nondomiciliary state. Here, however, the foreign source dividends and interest were *actually* subject to foreign withholding taxes.[14] In such a case, *any* state taxation (even by the state of commercial domicile) "creates more than the *risk* of multiple taxation; it creates multiple taxation in fact". *Japan Line Ltd.* v. *County of Los Angeles,* 441 U.S. 434, 99 S.Ct. 1813 (1979).

(4) If Some Portion of the Dividends, Interest and Capital Gains in Issue May Constitutionally Be Included in Appellant's Apportionable Business Income, the Due Process Clause Will Still Be Violated Unless a Correlative Adjustment Is Made to Idaho's Apportionment Factor.

As noted above, this issue was deliberately and explicitly left unresolved in *Mobil.* On three separate occasions, the majority opinion states that the issue was not considered because Mobil did not raise it. See 445 U.S. at 434, 441, n. 15 and 449. Mr. Justice Stevens' dissent

---

[14] Appellant was subject to Mexican and Australian withholding taxes on the dividends it received from Mexicana and M.I.M., respectively. The Income Tax Law of Mexico (Articles 60, V and 73, I) subjected such dividends to a tax which was imposed on the recipient (Article 61), but was withheld by the payor (Article 74). Similarly, Australia imposed a withholding tax (Income Tax Assessment Act, 1936-1973, Secs. 128A and 128B) on dividend payments by resident companies to nonresidents, and required the payor company to withhold the tax before the dividend was paid (Income Tax Assessment Act, 1936-1973, Sec. 221, YL). See also the Income Tax Law of Mexico, Article 65 with respect to the interest on the notes received by Appellant in connection with the sale of its Mexicana stock.

in *Mobil* makes it clear, however, that he would require an adjustment to the apportionment factor in a case like this. In this regard, his dissent states (445 U.S. at 461):

> "Unless the sales, payroll and property values connected with the production of income by the [dividend] payor corporations are added to the denominator of the apportionment formula, the inclusion of earnings attributable to those corporations in the apportionable tax base will *inevitably* cause Mobil's Vermont income to be overstated." [Emphasis supplied]

The reason for Mr. Justice Stevens' conclusion is clear. A nondomiciliary state can properly tax a resident corporation only on that portion of its income which is attributable to its activities in the nondomiciliary state. In determining that amount, it should make no difference whether the corporation's unitary business is conducted through operating divisions or separately incorporated subsidiaries. As this Court stated in *Mobil* (445 U.S. at 440-441):

> "Had appellant chosen to operate its foreign subsidiaries as separate divisions of a legally as well as a functionally integrated enterprise, there is little doubt that the income derived from those divisions would meet due process requirements for apportionability. Cf. *General Motors Corp.* v. *Washington*, 377 U.S. 436, 441, 84 S.Ct. 1564, 1568, 12 L.Ed.2d 430 (1964). *Transforming the same income into dividends from legally separate entities works no change in the underlying economic realities of a unitary business, and accordingly it ought not to affect the apportionability of income the parent receives.*" [Emphasis supplied]

The results of operating a taxpayer's unitary business through a subsidiary will *not* be the same,

however, as the results of operating through a division unless the taxpayer's apportionment factor is appropriately adjusted when dividends paid by the subsidiary are included in apportionable business income.[15]

---

[15] This can be demonstrated by assuming that the taxpayer conducts a unitary business through two divisions (Division A, which operates both inside and outside Idaho, and Division B, which operates entirely outside Idaho). Assume the following figures:

	Division A		Division B	
	All Locations	Idaho Situs	All Locations	Idaho Situs
Property	$200,000	$20,000	$100,000	-0-
Sales	400,000	40,000	200,000	-0-
Payroll	200,000	20,000	100,000	-0-
Business Income	$ 20,000		$ 10,000	

On these facts, the income apportionable to Idaho would be $2,000 computed as follows:

Total Business Income $30,000

Idaho Factors:

$$\left[\frac{\text{Property } 20{,}000}{300{,}000} + \frac{\text{Sales } 40{,}000}{600{,}000} + \frac{\text{Payroll } 20{,}000}{300{,}000}\right] \div 3 = 6\ 2/3\%$$

Idaho Taxable Income = $30,000 x .06 2/3 = $2,000

However, if the business of Division B were operated through a wholly-owned subsidiary corporation, and all income of the subsidiary were distributed as a dividend to the parent and treated as apportionable business income without any adjustment in the parent's apportionment factor, the income apportioned to Idaho would be increased by 50% to $3,000, computed as follows:

Parent's Business Income = $20,000 + 10,000 = $30,000

Parent's Idaho Factors:

$$\left[\frac{\text{Property } 20{,}000}{200{,}000} + \frac{\text{Sales } 40{,}000}{400{,}000} + \frac{\text{Payroll } 20{,}000}{200{,}000}\right] \div 3 = 10\%$$

Idaho Taxable Income = $30,000 x .10 = $3,000

Thus, unless the taxpayer's apportionment factor is adjusted when dividends are included in apportionable business income (in order to reflect the subsidiary's payroll, sales and property which generated the dividends), the result will inevitably violate the Due Process Clause by apportioning too much income to the taxing state.[16] *Norfolk & Western Ry. Co.* v. *Missouri State Tax Commission*, 390 U.S. 317 (1968); *Hans Rees' Sons, Inc.* v. *North Carolina ex rel. Maxwell*, 283 U.S. 123 (1931); *People ex rel. Alpha Portland Cement Co.* v. *Knapp, supra.*

Absent any appropriate adjustment to the apportionment factor, the nondomiciliary state will, in effect, be taxing directly a portion of the subsidiary's income — all of which was earned by activities conducted outside the nondomiciliary state. Such taxation of "extraterritorial values" is far different from taking the subsidiary's dividends into account, as part of the overall apportionment procedure, for the purpose of determining the parent corporation's income from its activities conducted within the taxing state. *Butler Bros.* v. *McColgan, supra.*

---

[16] In this case, for example, Idaho's inclusion of the dividends, interest and capital gains in issue in Appellant's apportionable business income for 1969 and 1970, coupled with Idaho's failure to adjust appropriately the apportionment factor, caused Appellant's Idaho taxable income to be increased from $419,876 to $2,274,750 in 1969 and from $127,775 to $2,162,340 in 1970. (App. A, *infra*, p. 39a; Tr. 130)

The Idaho State Tax Commission did include the amount of Appellant's dividend income in the denominator of the sales fraction. But this token adjustment was plainly inadequate to reflect the subsidiaries' underlying sales, assets and payroll which produced the distributed income and which clearly would have been taken into account had the businesses been run in a division of Appellant rather than in subsidiaries.

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction of the appeal.

Respectfully submitted,

GEORGE W. BEATTY
(Counsel of Record)

WILLIAM L. GOLDMAN
1200 18th Street, N.W.
Washington, D.C. 20036
(202) 457-8528

PHILIP E. PETERSON
318 5th Street
Lewiston, Idaho 83501